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No. 00-189

Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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TABLE OF CONTENTS

Page

Introduction 1

Argument 3

A. At no time prior to the point of statehood did Congress express an affirmative intent to defeat state title to submerged lands within the Coeur d'Alene Reservation 3

1. The 1889 Act 3

2. The 1889 Negotiations 8

3. 1890 Idaho Admission Act & Disclaimer Clause 11

B. The secondary evidence cited by the United States and the Tribe does not constitute a plain declaration of affirmative congressional intent to defeat state title 15

1. The 1888 Railroad Act 16

2. The 1891 Ratification Act 17

3. Other Post-Statehood Evidence 18

Conclusion 20

TABLE OF AUTHORITIES

Page

CASES:

Coyle v. Smith, 221 U.S. 559 (1911) 13

Dellmuth v. Muth, 491 U.S. 223 (1989) 2

Draper v. United States, 164 U.S. 240 (1896).....14, 15

Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1842) 6, 13

Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962) 14

Montana v. United States, 450 U.S. 544 (1981) 5, 6, 10, 11, 12, 15

Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 1, 13

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 13, 14

Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845)..... 13

Shephard v. Coeur d'Alene Lumber Co., 101 P. 591 (1909) 20

Shively v. Bowlby, 152 U.S. 1 (1894)..... 7

United States v. Alaska, 521 U.S. 1 (1997)..... 3, 4, 12

United States v. Holt State Bank, 270 U.S. 49 (1926) 9, 10, 11, 15

United States v. Louisiana, 363 U.S. 1 (1960) 17

United States v. Oregon, 295 U.S. 1 (1934) 13

Utah & N. Ry. Co. v. Fisher, 116 U.S. 28 (1885) ..14, 15

Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) 1, 2, 12, 17

TABLE OF AUTHORITIES – Continued

Page

Van Brocklin v. Anderson, 117 U.S. 151 (1886)....13, 14

Weber v. Bd. Of Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873)..... 5

CONSTITUTIONS, STATUTES AND RULES:

Act of May 15, 1886, 24 Stat. 29 4

Act of May 30, 1888, 25 Stat. 160 16

Act of October 12, 1888, 25 Stat. 552..... 16

Act of January 14, 1889, 25 Stat. 642..... 10

Act of February 22, 1889, 25 Stat. 676..... 12

Act of March 3, 1891, 26 Stat. 989 .....10, 17

Act of July 13, 1892, 27 Stat. 120..... 19

Act of July 16, 1894, 28 Stat. 107..... 13

Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958)..... 12

Executive Order of November 28, 1892..... 11

Executive Order of November 8, 1873..... 18

Executive Order of January 9, 1884 11

Idaho Const., Art. 21, § 19..... 12

Treaty of October 2, 1863, 13 Stat. 667 11

Treaty with the Chippewa, February 22, 1855, 10 Stat. 1165 11

Treaty with the Crow Indians, May 7, 1868, 15 Stat. 649 5

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

H.R. Ex. Doc. No. 247, 51st Cong., 1st Sess. (1890) 10

Bureau of Land Management Technical Bulletin 6, Manual of Instructions for the Survey of the Public Lands of the United States (1973) 19

Charles J. Kappler, Indian Affairs: Laws and Treaties (1904) 11

Charles C. Royce, Indian Land Cessions in the United States, reprinted in the 18th Annual Report of the Bureau of American Ethnology, H.R. Doc. No. 736, 56th Cong., 1st Sess. (1899) 10

Letter, Office of Indian Affairs to Gen. Benjamin Simpson, June 18, 1889 6

INTRODUCTION

Title to submerged lands is vested in each state "by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). Upon a state's admission, the state gains absolute title to submerged lands, and no power vested in Congress can defeat such title. *Id.* Congress cannot circumvent this constitutional limitation upon its powers by reserving to itself the authority to make dispositions of submerged lands after the date of statehood. It must, prior to statehood, either convey the submerged lands or reserve them in permanent federal ownership. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987). This Court, moreover, will "not infer an intent to defeat a State's equal footing entitlement from the mere act of reservation itself." *Id.*

These fundamental principles heretofore have been unchallenged. Respondents, however, now propose a third test for defeat of state title, drawn not from existing equal footing authority, but manufactured solely for the purpose of success presently. Under their new approach, and their interpretation of the record below, Congress temporarily defers the assumption of state title whenever Congress authorizes negotiations for a cession of reservation uplands, such negotiations are ongoing at the time of statehood, and, during the negotiations, the United States accedes to tribal demands for retention of submerged lands as consideration for the tribe's cession of uplands. U.S. Br. 32; Tribe Br. 16. The implicit assertion that Congress may defer temporarily a state's assumption of sovereignty over submerged lands for the purpose of retaining the ability to deprive the state of *some* of those lands after statehood is as implausible as it is unprecedented.[1]

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[1] The United States additionally asserts the equally implausible position that Congress defeated state title to the submerged lands in order "to negotiate with the Tribe for their

Beyond this core departure from accepted equal footing doctrine, Respondents suggest that it is not necessary that Congress specifically contemplate the effect of its action on the assumption of state sovereignty over submerged lands. *See* U.S. Br. 44-45. To adopt this suggestion would require the rejection of the principle that the United States must "establish that Congress affirmatively intended to defeat the future State's title" to submerged lands. *Utah Div. of State Lands*, 482 U.S. at 202. Such affirmative intent must take the form of a definite declaration or otherwise plain statement that "clearly express[es] an intention to defeat" a state's sovereign title to submerged lands. *Id.* at 208.[2]

Here, neither the 1889 Act nor the Act admitting Idaho into the Union clearly expressed an intent to defeat Idaho's title to submerged lands within the Coeur d'Alene Reservation. If anything, the opposite is true: Congress, despite its obvious concern over the inclusion of submerged lands in the Reservation, confined the subsequent negotiations to the purchase of timber and mineral lands. The clear implication is that it did not recognize tribal title to submerged lands. While Respondents struggle to construct an intent to recognize tribal title – and defeat state title – from surrounding circumstances, partial passages of the 1891 Act before statehood, and post-statehood actions, they ultimately fail to identify a single, clear expression of congressional purpose to

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release." U.S. Br. 28. Such an argument is inherently flawed, since without the *prior* defeat of state title, and the conveyance of submerged lands to the Tribe, there could be no negotiations with the Tribe for the release of submerged lands.

[2] Notably, in other areas where Congress has the authority to abrogate state sovereign rights, such as sovereign immunity, the Court has required that Congress must make its intention "unmistakably clear in the language of the statute." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). Where unmistakable statutory language is the standard, "recourse to legislative history will be futile." *Id.*

defeat state sovereign title to the submerged lands at issue.

ARGUMENT

A. At no time prior to the point of statehood did Congress express an affirmative intent to defeat state title to submerged lands within the Coeur d'Alene Reservation.

The arguments of the United States and the Tribe center primarily on the 1889 Act that authorized negotiations for a cession of a portion of the Coeur d'Alene Reservation, the negotiations that resulted, and the 1890 Act admitting Idaho into the Union. Each are addressed separately below.

1. The 1889 Act

The Respondents do not suggest that the 1889 Act conveyed any interest in submerged lands to the Tribe. Nor do they suggest that the 1889 Act was intended to set aside the lands within the 1873 boundaries as a permanent federal reservation. The Respondents are also unable to identify any specific language wherein Congress expressed an intent to defeat state title to any particular submerged lands. Finally, the Respondents admit that the 1889 Act omits any reference to the submerged lands that were supposedly the subject of the negotiations authorized by the Act.

To avoid the difficulties raised by the above facts, the Respondents suggest that Congress *necessarily* intended to reserve title to the submerged lands within the Coeur d'Alene Reservation for the time needed to negotiate with the Tribe to determine their ultimate disposition.[3]

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[3] The United States' argument rests in part on its assertion that this Court recognized, in *United States v. Alaska*, 521 U.S. 1 (1997), that § 6(e) of the Alaska Statehood Act was intended to

This proposition is based on two assertions: first, the Respondents assert that retention of submerged lands within the 1873 Reservation was "necessary to enable tribal members to continue their fishing and other uses of the lake and associated rivers and to preserve Congress's ability to bargain in good faith with the Tribe concerning possible cession of a portion of its Reservation." U.S. Br. 27; Tribe Br. 13. Second, the Respondents assert that by authorizing negotiations with the Tribe for a portion of "its reservation," Congress necessarily intended to recognize the Tribe's right to control the disposition of all lands within the Reservation, including submerged lands. U.S. Br. 26-27; Tribe Br. 13.[4]

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temporarily preserve the United States' prerogative to make a determination after statehood as to whether the United States would retain permanent ownership of submerged lands within the Arctic Wildlife Range. U.S. Br. 41-42. This is a significant alteration of the argument that the United States made to this Court in *Alaska*, where it asserted that § 6(e) was intended to maintain *permanent* federal ownership of all lands within the wildlife range, so that "[i]f the Secretary had ultimately denied the application, the United States would have continued to own those submerged lands – just as it had during the territorial period – unless and until Congress elected to *convey* them to Alaska." *United States v. Alaska*, No. 84, Original, Exception of the United States and Brief for the United States in Support of Exception at 46 (emphasis added).

[4] The United States also asserts that Congress, in enacting the 1889 Act, intended to "honor" the provision in the 1887 Agreement stating that "no part of the reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation," notwithstanding the fact that the act authorizing the 1887 negotiations expressly provided that "no agreement made shall take effect until ratified by Congress." Act of May 15, 1886, 24 Stat. 29, 44; App. 50. The quoted language was actually a standard provision in many treaties, and does not imply tribal ownership of submerged lands. The 1868 Treaty with the Crow Tribe provided that "[n]o treaty for the cession of any portion of

1. The assertion that Congress intended to retain the submerged lands within the 1873 Reservation for the purpose of providing for the Tribe's fishing needs is unsupported by the record. The only document the United States cites to support this proposition is an 1872 petition from the Tribe to the Commissioner of Indian Affairs. U.S. Br. 33, citing App. 27. There is no evidence in the record, however, that this document was ever forwarded to Congress. Congress's perception of the Tribe's needs, as of 1889, was instead shaped by the myriad documents provided to Congress in relation to the 1887 Agreement and the controversy that arose with regard to its inclusion of submerged lands within the Reservation. These documents include petitions from the Tribe, reports from commissions, letters from the Tribe's supporters, reports from the Commissioner of Indian Affairs, and transcripts of negotiations with the Tribe. Throughout these documents, however, there is not a single mention of fishing. App. 62-136, 162-358. In contrast, the Tribe's agricultural successes are prominently mentioned. App. 70, 75-76, 99, 126-27. Congress perceived the Tribe as farmers, a fact reflected in its mandate in the 1889 Act to protect the Tribe's agricultural lands.

2. In its deliberation of the 1889 Act, Congress was well aware of the fact that it held submerged lands "only in trust for the future State." *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 65 (1873). Congress also knew that in order to defeat that trust, it would have to make its intent plainly known: this Court had previously declared that it would not infer a defeat of sovereign title

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the reservation . . . shall be of any force or validity . . . unless executed and signed by . . . a majority of all the adult male Indians occupying or interested in the same." Treaty with the Crow Indians, May 7, 1868, Art. 11, 15 Stat. 649, 652. Yet, in *Montana v. United States*, 450 U.S. 544 (1981), this Court never suggested that this language vested the Crow Tribe with property interests that would include ownership of navigable waters.

from ambiguous language. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 416 (1842); *Montana v. United States*, 450 U.S. 544, 552 & n.2 (1981) (stating presumption against non-conveyance and the fact that "Congress was, of course, aware of this presumption once it was established by this Court").

Nonetheless, the United States asserts that Congress intended to defeat state title to submerged lands by authorizing negotiations with the Tribe for the purchase of "its reservation." In truth, however, the actual mandate to the federal commissioners was to negotiate with the Tribe for "the purchase and release by said tribe of *such portions* of its reservation not agricultural and *valuable chiefly for minerals and timber.*" App. 144 (emphasis added). On its face, the 1889 Act does not contemplate the purchase of submerged lands. Thus, retention of submerged lands was not necessary to the negotiations that Congress authorized. The fact that the authorization in the 1889 Act was limited to timber and mineral lands was reflected in the instructions given by the Commissioner of Indian Affairs to the commissioners who negotiated the 1889 Agreement:

> They make little if any use of the northern part of the reservation, for the simple reason that the best agricultural lands are in the extreme southern part of the reservation, and they are essentially an agricultural people. Hence the portion of the reservation they will be most likely to part with is the northern portion, the lands of which are believed to be chiefly valuable for minerals and timber, *classes to which the act only applies.*

Letter, Office of Indian Affairs to Gen. Benjamin Simpson, June 18, 1889, App. 148 (emphasis added). The Commissioner also emphasized that "the Act . . . *confines the negotiations* to the purchase of lands 'not agricultural and valuable chiefly for minerals and timber.' " App. 149 (emphasis added). Clearly, the Commissioner was interpreting Congress's intent, and he interpreted the 1889 Act

to apply only to timber and mineral lands. In contrast, the United States' assertion that Congress purported to negotiate with the Tribe for the release of submerged lands ignores the plain language of the 1889 Act.

The Tribe appears largely to agree with the State's interpretation of the 1889 Act. It asserts that the sole objectives of the 1889 Act were stated on the face of the Act, namely "to obtain mineral and timber lands." Tribe Br. 16, 32. It further asserts that "[t]here is *no* mention in the statute of any congressional desire to obtain the release of any portion of the Lake or any of the rivers." Tribe Br. 16.

The Tribe also admits that the official position of the United States at the start of the 1889 negotiations, as stated by General Simpson, was one of "common-interest status for the Lake." Tribe Br. 32.[5] In the Tribe's view, the intent to reserve submerged lands arose *during* the negotiations, when General Simpson "changed his approach immediately and dramatically," and agreed, in the Tribe's view, to tribal ownership of the lower part of the Lake. Tribe Br. 33. While the State disagrees that Simpson modified his initial position of common ownership, *infra*, there is no dispute that Simpson's original statement reflected the official position of the United States regarding the status of the submerged lands as of the opening of the 1889 negotiations. Thus, the United States' suggestion that Congress, in the 1889 Act, had defeated future state title to the Lake pending the outcome of the negotiations cannot be squared with the facts.

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[5] General Simpson's statement that the Lake belonged "to all, every one who wants to travel on it," App. 183, was a reiteration of the principle that navigable waters are held as "a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery." *Shively v. Bowlby*, 152 U.S. 1, 16 (1894). The Tribe agrees that General Simpson's proposal was "essentially along the lines of what would result if lake ownership were to pass to the state at statehood." Tribe Br. 14.

2. The 1889 Negotiations

While General Simpson's initial statement reflected the official federal position regarding ownership of submerged lands within the Reservation, the United States and the Tribe assert that Simpson changed his position during the negotiations and agreed to exclusive tribal ownership of a portion of the Lake. They further assert that this change in position was implicitly incorporated by Congress into its "understanding" of the sovereign rights Idaho would assume upon its admission into the Union. Aside from the problems inherent in any theory based on congressional "understanding" rather than congressional action, the Respondents' theory fails because it is wrong on the facts.

The Respondents assert the boundary across the middle of Coeur d'Alene Lake originated as a response to Chief Seltice's supposed "rejection" of the principle of public ownership. U.S. Brief at 10-11; Tribe Br. 14, 32. The transcript, however, shows that the boundary across the Lake was established, and shown to the Tribe, *before* Simpson explained the principle of public ownership:

> Saltise [sic]. Where will you make the lines?
>
> General Simpson. We fixed a line, as was shown you on the map; it is just as Mr. Liberty explained it to you. You understand that the lake belongs to you as well as to the whites – to all, every one who wants to travel on it.

App. 182-83. After being shown the boundary line on the map, Seltice responded: "That is your idea about the boundary. You know we do not understand papers; in taking it that way we will not know the boundaries." App. 183. Although the United States characterizes Seltise's remarks as a rejection of the principle of common ownership of the Lake, it is, when read in context, simply a request for clarification of the boundaries proposed by Simpson, based on the fact that Seltise was not used to dealing with maps.

Simpson then described the boundaries of the proposed cession, as previously shown on the map, by a narrative metes and bounds description. When finished, Simpson added that: "Now, if we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River." App. 183. The only action intervening between Simpson's first statement, of common ownership of navigable waters, and his second statement, acknowledging that the Tribe would still "have" the St. Joseph River and the lower part of the Lake, was Seltise's interjection that he did not understand the map. There was not, as the Respondents suggest, any alteration in the commissioners' position, nor any alteration in the boundary across the Lake. Given these facts, the most natural reading of Simpson's second statement is that it was a reiteration of the first, i.e., that the Tribe would "have" the river and the lower part of the Lake upon the terms previously described, namely common ownership and use with non-Indians.

In a similar vein, the Respondents assign undue weight to the fact that the boundary of the 1889 cession crosses Coeur d'Alene Lake. U.S. Br. 15, 31; Tribe Br. 15-16. They ignore the fact that the mineral and timber lands being discussed for possible cession lay on both sides of Coeur d'Alene Lake, so that it was impossible to describe the cession, or the remaining reservation, in terms of a metes and bounds boundary that did not cross the Lake at some point. Logically, the commissioners chose to place this crossing by reference to an easily identifiable landmark, such as the mouth of the Coeur d'Alene River.

The Respondents also err in asserting that it was unusual for reservation boundaries to cross navigable waters. It was in fact commonplace. Both *Montana* and *United States v. Holt State Bank*, 270 U.S. 49 (1926), involved reservations where Congress had ratified, after statehood, cessions with boundaries that crossed lakes or

ran down the middle of navigable waterways. The cession of a portion of the Crow Reservation occurred in the same act that ratified the 1889 Agreement, and included all lands lying west and south of a described line that, in part, headed "in a due easterly course on a parallel of latitude to a point where it intersects the mid-channel of the Big Horn River, then following up the mid-channel of said river to a point where it crosses the Montana and Wyoming State line." Act of March 3, 1891, 26 Stat 989, 1040. In *Montana,* this Court never suggested that the post-statehood ratification of a boundary that ran along the middle of the Big Horn River was evidence that Congress recognized tribal title to the riverbed. The United States offers no reason to reach a different result here.

Holt State Bank addressed title to submerged lands within that portion of the Red Lake Reservation that was ceded by the Chippewa Indians pursuant to the Act of January 14, 1889, 25 Stat. 642. The cession included a boundary that cut straight across Red Lake.[6] An earlier cession included boundaries that went "down the main channel of [the] Thief River to its mouth on the Red River," and "up the main channel of the Red River to the

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[6] The negotiations authorized in the 1889 Act resulted in an agreement wherein the Red Lake Band of Chippewa Indians ceded certain lands and reserved the remainder. The northern boundary between the ceded and reserved lands "proceeded easterly to the most northwesterly point of the Upper Red Lake, thence easterly along the northerly shore of said Upper Red Lake to a point due north of a point 1 mile east from the easterly end of the Lower Red Lake, thence due south to the last-named point." H.R. Ex. Doc. No. 247, 51st Cong., 1st Sess. 28 (1890). The map of the reserved lands clearly shows it cutting across the middle of Upper Red Lake. *See* Charles C. Royce, *Indian Land Cessions in the United States,* reprinted in the 18th Annual Report of the Bureau of American Ethnology, H.R. Doc. No. 736, 56th Cong., 1st Sess. (1899). The map is found at plate 35, and the explanatory text at pages 934-35.

mouth of the Shayenne." Treaty of October 2, 1863, 13 Stat. 667. Yet, as in *Montana*, the Court never suggested that Congress's approval of such boundaries affirmed the Tribe's title to submerged lands within the original Red Lake Reservation.

The fact that neither *Montana* nor *Holt State Bank* mentioned boundaries that crossed the middle of navigable waters is not surprising, given the fact that the United States often set apart Indian reservations, both before and after statehood, with boundaries that crossed the middle of lakes or went down the middle of navigable rivers.[7] Reservation boundaries ran along or across navigable waters without any regard to the ownership of the underlying submerged lands.

3. 1890 Idaho Admission Act & Disclaimer Clause

The Idaho Constitution disclaims "all right and title . . . to all lands lying within such limits owned or held by any Indian or Indian tribes" and recognizes that

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[7] The Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165, established a reservation for the Pillager and Lake Winnibigoshish bands in the Territory of Minnesota. The boundary of the reservation went up the Little Boy River "to Lake Hassler, thence through the center of said lake to its western extremity, thence in a direct line to the most southern part of Leech Lake, and thence through said Lake, so as to include all the islands therein." 10 Stat. at 1166. The Executive Order of November 28, 1892, set apart a tract of land within the State of Washington for the use of the Yakima Indians. The tract's boundary ran "parallel to the general course of the [Wenatchee] river to the [Wenatchee] lake, then in a direct line across the lake to the place of beginning." 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 926-28 (1904). The Executive Order of January 9, 1884, established a reservation for the Yuma Indians in the State of California. The boundary went "to the middle of the channel of the Colorado River, thence up said River, in the middle of the channel thereof. . . . " 1 Kappler 832.

"said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Idaho Const. Art. 21, § 19, App. 371. The United States argues that Congress, by accepting the disclaimer clause, "intended that all lands within the Tribe's established Reservation would remain in federal ownership for the Tribe's benefit at the time of statehood notwithstanding (or indeed, because of) Congress's failure to take final action on the 1889 Agreement." U.S. Br. 29. The Tribe takes a slightly different tack, arguing that the disclaimer clause has the "same operative effect as the provisions of § 11(b) [and § 6(e)] of the Alaska Statehood Act." Tribe Br. 44. These arguments confuse the difference between the generic disclaimer clause in the Idaho Constitution and the affirmative declarations of intent reviewed in *United States v. Alaska*, 521 U.S. 1 (1997), which explicitly modified federal/state relations relating to specific parcels of land that might otherwise have passed to the State of Alaska.

Disclaimer clauses have not played a role in this Court's equal footing cases.[8] Indeed, they could not, since the disclaimer of right and title to federal and Indian

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[8] This Court's recent submerged lands cases have all involved submerged lands within states with disclaimer clauses similar to that found in the Idaho Constitution. The Alaska Statehood Act, reviewed by this Court in *United States v. Alaska*, required the State of Alaska to disclaim "all right and title to any lands . . . the right or title to which is held by the United States or is subject to disposition by the United States. . . . " Pub. Law. 85-508, § 4, 72 Stat. 339 (1958). Yet, in *Alaska*, this Court never suggested that the disclaimer had any relevance to the question of whether Congress defeated state title to submerged lands within federal reservations. In *Montana*, this Court did not mention the Montana enabling act, which required the State to disclaim title to "all lands . . . owned or held by any Indian or Indian tribes." Act of February 22, 1889, § 4, 25 Stat. 676, 677. In *Utah Div. of State Lands*, there was no mention of the Utah Enabling Act, which required a disclaimer of title to

lands is "a disclaimer of proprietary rather than governmental interest." *Organized Village of Kake v. Egan*, 369 U.S. 60, 69 (1962). Because ownership of submerged lands is an incident of sovereignty, not a proprietary right, the disclaimer of proprietary interests in Indian lands has no bearing on a state's claims to submerged lands. *See Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 415-16 (1842) (holding that a transfer of sovereignty carries with it ownership of submerged lands, despite express retention of all proprietary rights); *United States v. Oregon*, 295 U.S. 1, 14 (1935) (upon the admission of a state, "the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty").

Disclaimer clauses do not alter the respective sovereignty of the federal and state governments: "powers of sovereignty . . . may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, *which would not be valid and effectual if the subject of congressional legislation after admission.*" *Coyle v. Smith*, 221 U.S. 559, 573 (1911) (emphasis added). Disclaimers exempting federal property from state authority "are but declaratory, and confer no new right or power upon the United States." *Van Brocklin v. Anderson*, 117 U.S. 151, 167 (1886). For these reasons, this Court has held that disclaimers addressing navigable waters simply enunciate rights Congress would otherwise possess under the Commerce Clause and other constitutional provisions, and do not alter the state's title to the underlying submerged lands. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 229-30 (1845). Thus, even in cases confirming the declaration, in a disclaimer clause, of the exclusive right of the federal government to

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"unappropriated public lands." Act of July 16, 1894, § 3, 28 Stat. 107, 108.

control its lands, the Court has held simultaneously that "rights of local sovereignty, including the title . . . in the shores of navigable waters below high-water mark, vest in the state, and not in the United States." *Van Brocklin*, 117 U.S. at 168.[9]

Nor does the disclaimer banish state sovereignty over Indian reservations. This Court has held "that 'absolute' federal jurisdiction is not invariably exclusive jurisdiction." *Organized Village of Kake*, 369 U.S. at 68. It was early recognized that Indian reservations are "in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law." *Id.* at 72; *see also Draper v. United States*, 164 U.S. 240, 247 (1896) (holding that disclaimer did not prevent state sovereign authority over "crimes committed on a reservation or Indian lands by other than Indians or against Indians"); *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28, 31-32 (1885) (rejecting argument that Indian reservations were excluded from the limits of Idaho Territory and excepted from its jurisdiction).

Here, however, the United States attempts to rewrite the disclaimer clause by asserting that it applies to all lands that "Congress . . . *treated* as held by the Indians," and asserts that the disclaimer applied to "all lands within the Tribe's established Reservation." U.S. Br. 29 (emphasis added). The United States' argument ignores several key aspects of the disclaimer clause. First, by its plain terms, the clause does not disclaim title to all lands within the boundaries of Indian reservations, only those actually "owned or held" by the occupant tribe. This distinction was purposeful, since Congress knew that

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[9] The Tribe asserts that this Court reached a different result in *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). The Tribe simply misreads *Metlakatla*. The Court never suggested that the disclaimer clause played any role in determining whether submerged lands within the tribe's reservation were tribal property.

many reservations contained non-Indian lands that were subject to state or territorial jurisdiction. *See, e.g., Utah & N. Ry. Co*, 116 U.S at 32 (upholding jurisdiction of Idaho Territory to impose taxes on railroad right-of-way through the Fort Hall Reservation). Second, the United States' argument fails to account for the fact that the disclaimer language was drafted in response to conditions created by the General Allotment Act, and was intended primarily to prevent the divestment of title to tribal allotments through the application of state laws. *Draper*, 164 U.S. at 246.

Perhaps most important, however, is the simple fact the disclaimer language does nothing to alter *federal* laws defining the ownership of lands within Indian reservations. And, under federal law, submerged lands within Indian reservations are held in trust for future states, unless Congress affirmatively defeated such title. *Montana*, 450 U.S. at 552; *Holt State Bank*, 270 U.S. at 55. Thus, if Congress failed, prior to the point of statehood, to take the steps necessary to defeat Idaho's sovereign ownership of the submerged lands within the Coeur d'Alene Reservation, the disclaimer clause does not prevent the State from assuming its rightful title to such lands. The disclaimer clause, in sum, does not operate *independently* to divest Idaho of a right it otherwise possesses by operation of federal law.

B. The secondary evidence cited by the United States and the Tribe does not constitute a plain declaration of affirmative congressional intent to defeat state title.

Because they cannot identify specific language in either the 1889 Act or the Idaho Admission Act that affirmatively defeats state title to submerged lands within the Coeur d'Alene Reservation, the Respondents direct the Court to several congressional actions, both pre- and post-statehood, which it asserts are "recognitions" of tribal title to the submerged lands at issue. Generally,

none of the cited acts is inconsistent with state title to submerged lands within the Coeur d'Alene Reservation, and none amounts to the definite declaration of intent that this Court has held is necessary to defeat state sovereign title to submerged lands.

1. The 1888 Railroad Act

In 1888, Congress granted a railroad company a right-of-way across the width of the Coeur d'Alene Reservation. A very small portion of the right-of-way passed over navigable waters. Act of May 30, 1888, 25 Stat. 160. The United States suggests that Congress's grant of the right-of-way required "the acquisition from the Tribe of submerged lands under Coeur d'Alene Lake." U.S. Br. 9-10. Congress, however, was free to grant rights-of-way over submerged lands regardless of whether it held title in trust for a future state. In fact, Congress often granted such rights after statehood, as an exercise of its authority to control commerce on the nation's waterways. *See, e.g.*, Act of October 12, 1888, 25 Stat. 552 (authorizing highway bridge over Lake Champlain in State of Vermont).

The Respondents assert, however, that Congress, by requiring compensation to the Tribe for the grant of the right-of-way, necessarily acknowledged tribal ownership of submerged lands. The Respondents ignore the fact that Congress did not explicitly direct compensation for the use of submerged lands, but instead left the fixing of compensation to the discretion of the Secretary of Interior. App. 138. Presumably, this left the Secretary with the ability to exclude compensation for the several hundred feet of the right-of-way that passed over submerged lands. Even if not, it would be unreasonable to base a defeat of state title on the fact that the United States fixed compensation by referring to the total length of the track, rather than excluding that miniscule portion that crossed over the St. Joe River. Such a windfall to the Tribe falls far short of the plain declaration of intent needed to divest a state of property that is "an inseparable attribute" of its

sovereignty. *United States v. Louisiana*, 363 U.S. 1, 16 (1960).

2. The 1891 Ratification Act

The Respondents insist that the Act of March 3, 1891, 26 Stat. 989, embodies the understanding that Congress retained ownership of submerged lands within the 1873 boundaries and conveyed a portion of them to the Tribe upon ratification of the 1887 and 1889 Agreements. In reality, however, the 1891 Act reveals a fatal flaw in the Respondents' argument that Congress retained ownership of all submerged lands within the 1873 boundaries. Section 22 of the 1891 Act provides that:

> *[A]ll* lands so sold and released to the United States, as recited or described in both of said agreements, and not heretofore granted or reserved from entry or location, shall, on the passage of this act, be restored to the public domain, and shall be disposed of by the United States to actual settlers only.

App. 386-87 (emphasis added). The Act plainly embodies the understanding that the lands "sold and released" by the Tribe consisted solely of uplands; otherwise, the plain language of the Act would open the submerged lands underlying Coeur d'Alene Lake to settlement. *See Utah Div. of State Lands*, 482 U.S. at 203-04 (proviso allowing opening of reserved lands to settlement implied that Congress did not intend to reserve submerged lands).

The Respondents attempt to counter this plain language with a reference to the Act's conveyance of "such portion of said reservation" as was included in an 1871 conveyance, by Chief Seltice to Frederick Post, of "all three of the river channels and islands" at Post Falls on the Spokane River. App. 387-88. The Respondents fail to note, however, that the actual language of the Act conveys to Post only "such portion of said reservation as is recited in the agreement" between Seltice and Post. App. 387. It was left to the General Land Office to determine

what portion of the lands in the agreement were included in the Reservation. The corresponding patent to Post includes both banks of the Spokane River, and the beds of *all three* river channels. App. 404-09. The 1873 Reservation, however, went only to the center of the channel of the Spokane River. Exec. Order of Nov. 8, 1873, App. 47-48. The portion of the River lying north of the Reservation boundary had never been reserved. Other than assuming an illegal grant, the only explanation for the patent to the river beds outside the 1873 boundary is that this particular part of the river, being a waterfall, was not understood to be navigable, so that ownership of both banks carried with it the ownership of the beds.[10] Regardless, this was a determination made by the General Land Office, not by Congress. The language chosen by Congress is neutral regarding the question of whether the riverbed was included in "such portion of said reservation as is recited in the agreement." App. 387.

3. Other Post-Statehood Evidence

The United States asserts that the Harrison cession of 1894, a portion of which includes boundaries over Coeur d'Alene Lake, confirms that Congress retained ownership of submerged lands. U.S. Br. 39-40. As noted earlier, however, it was not unusual for the United States to define post-statehood cessions using boundaries crossing over navigable waters. *Supra*, footnote 7. Further, Congress exercised no rights of ownership over the submerged lands at issue; it simply modified the Reservation boundary as it passed over the waters. A modification of reservation boundaries across navigable waters is not

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[10] The State does not assert that the Spokane River is non-navigable in fact, only that at this particular point in history, the General Land Office may have concluded that this particular portion of the river was non-navigable and thus the proper subject of a patent to Post.

inconsistent with state ownership of the underlying submerged lands.[11]

The remainder of the post-statehood evidence cited by the United States and the Tribe consists of evidence that was stricken from the record. The United States asserts that the survey of the lands conveyed from the United States to the State of Idaho for designation as Heyburn State Park included submerged lands. U.S. Br. 40. The assertion that the survey of the conveyance included submerged lands is a disputed fact that was not resolved by the trial court, because it ruled that "with the exception of evidence relating to the Harrison cession of 1894, it would not consider post-statehood evidence." Order of July 9, 1998, Docket No. 131.[12]

Likewise, the Tribe improperly cites a singular document, Exhibit No. 2254, that was stricken from the record. Order of July 9, 1998, Docket No. 131 (striking Exhibit No. 2254). The Tribe asserts, without foundation, that the document demonstrates that the Department of Interior had concluded that the Tribe "owned" the beds of navigable waters, since it required payment from a company seeking to build log booms in the St. Joe River. Tribe Br. 21. Such an assertion ignores the fact that riparian land

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[11] It should be noted that in its initial authorization of the Harrison Cession, Congress specified that the western boundary of the cession should follow the shore of Coeur d'Alene Lake. Act of July 13, 1892, 27 Stat. 120, 124.

[12] Although the United States cites an expert report for the proposition that "the survey of the withdrawal included acreage of submerged lands," U.S. Br. 40, the quoted expert report states only that the "official government appraisals valued swamp and overflow lands." 2 E. Richard Hart, Expert Report 278 (Rec., Ex. 1439). Swamp and overflow lands are not submerged lands, but consist of marshes, intermittent ponds, and the lower levels of stream flood plains. Bureau of Land Management Technical Bulletin 6, *Manual of Instructions for the Survey of the Public Lands of the United States* 179 (1973). Such lands are not meandered in surveys, as are navigable waters. *Id.*

owners along navigable waters have a right of ingress and egress to and from those waters. *Shephard v. Coeur d'Alene Lumber Co.*, 101 P. 591 (1909). The "right of ingress and egress . . . is a property right . . . that must be respected." *Id.* at 593. For example, the Idaho Supreme Court has held that the construction of log storage facilities along the shores of navigable waters converts the right of public use into a private use and violates "the upland owner's property rights." *Id.* Thus, the requirement of payment to the Tribe for the construction of a log boom adjacent to its lands did not imply ownership of the bed itself, but was rather compensation for interference with the Tribe's then-existing riparian rights of access. Such rights, of course, ceased when the Reservation was allotted and all lands along the Coeur d'Alene Lake and the St. Joe River were sold in fee to non-Indians. 2 Hart Expert Report 274 (describing allotment and cessation of tribal title to riparian lands).

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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